STATE OF CALIFORNIA PETE WILSON, *Governor*

PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

June 25, 1996

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VIA FEDERAL EXPRESS

William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20036

Re: CC Docket No. 96-115

Dear Mr. Caton:

Please find enclosed for filing an original plus eleven copies of the REPLY COMMENTS OF THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA ON THE NOTICE OF PROPOSED RULEMAKING in the above-referenced docket.

Also enclosed is an additional copy of this document. Please file-stamp this copy and return it to me in the enclosed, self-addressed postage pre-paid envelope.

Yours truly,

Mary Mack Adu

Mary Mack Adu
Attorney for California

MMA:dd

Enclosures

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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In the Matter of Implementation of the Telecommunications Act of 1996 Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information	CC Docket No. 96-115

REPLY COMMENTS OF THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA ON THE NOTICE OF PROPOSED RULEMAKING

I. Introduction and Summary

The People of the State of California and the Public Utilities Commission of the State of California (California or CPUC) respectfully submit these reply comments to the Federal Communications Commission (FCC or Commission) on the Notice of Proposed Rulemaking (NPRM) regarding the implementation of the Customer Proprietary Network Information (CPNI) provisions in the Telecommunications Act of 1996 (hereafter, the 1996 Act).

Because it was not possible for California to read all the filings and respond to every issue raised by other parties, the CPUC has limited these reply comments to those issues it considers most important for the Commission's consideration. California's silence on issues not addressed should not be taken as either agreement or disagreement.

In summary, California renews it recommendation that the FCC adopt CPNI authorization and notification requirements similar to

those used in California.[1] The CPUC believes its regulations truly achieve a balance between consumer privacy and competitive interests. Alternatively, should the Commission choose to implement regulations distinct from those in California, the CPUC urges the Commission to adopt rules flexible enough to accommodate customers' expectation of privacy, and not to preempt state regulations that are in accord with the 1996 Act.

II. A Broad Interpretation of the Term "Telecommunications Services" Does Not Reflect the Intent of the Act, Is Not in the Best Interests of the Consumer, and Does Not Promote Competition.

SBC Communications, Inc. (SBC) believes the Section 222 term "telecommunications services" should be given a broader interpretation than the rulemaking notice proposes.[2] Such interpretation allows incumbent service providers to use CPNI to market new services without first obtaining customer approval. The CPUC disagrees with the position of SBC. SBC fails to acknowledge that a broader interpretation gives incumbents, such as SBC, a competitive advantage over new entrants in marketing new services. The CPUC believes that SBC's interpretation is contrary to the language and goals of the Act, and does not

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1. Public Utilities (PU) Code Section 2891 requires carriers to obtain a residential subscriber's written consent before disclosing their CPNI, and PU Code Section 2891.1 prohibits a telephone corporation from selling licensing lists that include residential unlisted numbers. Similarly, PU Code Section 2889.5 sets forth comprehensive customer notification, authorization and verification requirements for changing telephone service.

2. CC Docket 96-115, SBC Opening Comments, pp. 5-9.

strike a balance between privacy and competition. The CPUC feels that incumbents already enjoy an inherent advantage by virtue of their incumbent status. That advantage should not be further increased by preferential access to CPNI. California fails to see how giving one party a competitive advantage furthers the Act's goal of promoting competitive neutrality.

California fears that a broad interpretation has the potential to act as a barrier to competitor entry. While incumbents would have free access to customer CPNI for marketing new services, competitors would be handicapped by the necessity of and cost associated with obtaining prior customer approval. New entrants, attempting to achieve competitive parity with incumbents, would be burdened with additional expense. Even then, parity is improbable since not all consumers will approve access. This situation is likely to negatively impact competitor decisions about entering the market. Interpreting the Act in a way that impedes entry thwarts the Act's goals of encouraging investment in new technology and accelerating rapid deployment of advanced telecommunications.

California sees the true balance between privacy and competition as requiring all carriers, including incumbents, to obtain customer approval to use CPNI for marketing new services. This includes CPNI gathered by the incumbent service provider and used for purposes other than providing the existing service. In addition, all carriers, including new entrants, have an obligation to protect the customers privacy by not allowing CPNI to be used to market new services

III. "One-Stop Shopping" Should Not Compromise Legitimate Privacy Concerns or Thwart Competitive Neutrality.

SBC contends that consumer interests are better served by a broad interpretation since consumers will be able to enjoy "one-stop shopping."[3] Arguably, the convenience of one-stop shopping benefits both consumers and carriers. However, the larger question is whether this convenience outweighs the potential infringement of privacy rights and the negative impact on competition that could result when a carrier uses its incumbent status to impede the market entry of competitors. If incumbents are allowed to freely access customers CPNI while competitors must first obtain customer approval, customers are much more likely to be informed about the services available from their current service provider. California disagrees with the assumption that CPNI is even necessary for one-stop shopping.

The Act stresses the goal of maximizing consumer choice of services for information and entertainment needs. The most important element of maximizing customer choice is information. The Commission should adopt regulations that equalize incumbent and competitor access to CPNI. In that way, consumers have access to the widest range of information available and are able to make informed choices regarding their selection of services and service providers. SBC's interpretation does not maximize consumer choice. It maximizes incumbents' marketing power.

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3. CC Docket 96-115, SBC Opening Comments, p. 8.

IV. The FCC's Interpretation that CPNI Use Shall Be Restricted to the Telecommunications Service From Which It Was Derived Comports With Section 222(c)(1) and Congressional Intent.

The FCC's interpretation that "Section 222(c)(1), by its terms, bars a telecommunications carrier from using CPNI obtained from the provision of 'a telecommunications service' for any purpose other than to provide 'the telecommunications service' from which the CPNI is obtained or services necessary to provide 'such telecommunications service'" is right on point. NPRM, ¶21. Contrary to SBC's contention, the FCC's interpretation is not "overly narrow." SBC, p. 5. The FCC's interpretation is consistent with the clear terms of the 1996 Act which state unambiguously that: "Except as required by law or with the approval of the customer, a telecommunications carrier that receives or obtains customer proprietary network information by virtue of its provision of a telecommunications service shall only use, disclose, or permit access to individually identifiable customer proprietary network information in its provision of (A) the telecommunications service from which such information is derived...." (Emphasis added.)

SBC does not support the FCC's view that the intent of the Act is to prohibit "established" carriers from using CPNI to facilitate their entry into new markets without prior customer authorization. SBC, p. 7. We disagree with SBC on this point and believe instead that the FCC correctly captured the essence of what the Act is all about, i.e., promoting competition and providing equal access. A carrier should not enjoy an advantage over another carrier simply by virtue of being an incumbent.

Unequal access to information would constitute a very real barrier to entry, contrary to Section 253 of the Act.

Pacific Telesis (Pacific) advocates CPNI use for services "other than the services from which the CPNI was derived." Pacific, pp. 5-6. This is a clear departure from the letter and spirit of Section 222 of the Act. Therefore, the CPUC does not support this position. The rationale that "if a customer feels that a given carrier intrudes by excessive advertising and promotion, he can now (or soon) simply chose another provider" is not a solution and is not so simple. Pacific, p. 6. Simply changing to another provider does not prevent the continued use of CPNI for marketing by the original carrier. No mention is made of the number of times a customer could be forced to change carriers due to marketing abuse by a carrier, nor was anything said about what happens to the CPNI once it is disseminated for widespread use. Furthermore, it would be futile to change carriers if any carrier can use CPNI for services other than the service from which CPNI was derived.

V. The FCC Should Not Adopt Authorization Rules That Allow Customer Approval To Be Inferred Or Deemed To Be Approved If the Customer Fails to Opt Out.

SBC asserts that customer approval for use of CPNI should be inferred if after written notification of restricted access to CPNI, customers do not request confidentiality.[4] Pacific

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4. CC Docket 96-115, SBC Opening Comments, pp. 10-12.

favors rules providing that if a customer fails to indicate a desire to "opt out" of the carrier's proposed use of CPNI, the customer is deemed to have given approval. Pacific's Comments, p. 7. The CPUC disagrees with both of these proposals. The operating principles of each proposal are identical: put the burden on the customer to come forward and request restriction of CPNI, and if he fails to do so, approval is "inferred" or "deemed" to have occurred. What is at stake is the right to privacy which should not be sacrificed in such a cavalier fashion.

If customers wish to subscribe to telecommunications services, they have no choice but to divulge certain information about themselves. What they do not voluntarily divulge is made available to their carrier by virtue of the carrier's provision of service to them.[5] These proposals would allow carriers to exploit their position as incumbents to give them a competitive advantage over new entrants. In addition, privacy could be compromised, notwithstanding Pacific's suggestion that information such as credit information "is not of an extremely personal nature." Pacific, p. 8. Many Californians and many Americans would think otherwise. Furthermore, the intent of Section 222 is to balance competition and privacy, not sacrifice one for the other. In fact, Pacific's proposal would sacrifice

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5. Information such as a customer's calling patterns, political preferences, product interests, and social habits can be extracted from telephone records.

both; competition because it advantages the incumbent and privacy because it is presumptively waived.

SBC and Pacific point to Computer III rules to support their "tacit" approval proposals. At the same time, both acknowledge that the 1996 Act supersedes prior Commission rules.[6] SBC's and Pacific's interpretation shifts responsibility from the carrier to the consumer. Rather than the carrier being required to obtain customer approval, their proposals require the customer to specifically request confidentiality or customer approval will be inferred.[7] Pacific's and SBC's proposals operate under the presumption that a customer approves unless he or she indicates otherwise. The right to privacy is too important to allow a presumption to waive that right.

California is also concerned that SBC's suggested notification and authorization program is a disincentive to maintaining accurate verification records. Requiring carriers to obtain explicit customer approval provides ease of administrative oversight, and does not eliminate consumer privacy rights by default.

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6. See, SBC, p. 11 and Pacific, pp. 7-8. The FCC itself concurs that the 1996 Act prevails over prior rules (NPRM, ¶3): "To the extent that the 1996 Act requires more of a carrier, or imposes greater restrictions on a carrier's use of CPNI, the statute, of course, governs."

7. CC Docket 96-115, SBC Opening Comments at p. 11.

VI. **Oral versus Written Authorization**

SBC and Pacific interpret Section 222 to allow oral authorization. In its comments on pages 5-6, the CPUC acknowledges that under the 1996 Act customer approval may be oral or written. However, we encourage the FCC to strengthen rules that protect both customers and carriers by requiring written approval. The CPUC agrees with the FCC that carriers that obtain oral approval should bear the burden of proof that authorization was lawfully obtained in the event of a dispute. NPRM, ¶32. Pacific objects to placing the burden of proof on carriers, claiming that "[r]esponsible carriers will create processes to indicate that they have obtained customer approval." Pacific, p. 6. As competition in the marketplace increases, rules must be broad enough to encompass irresponsible players, as well. Unfortunately, California has had enough experience with utility market abuse to know that such rules are necessary.[8]

VII. **Notification and Authorization Rules Should Be Flexible Enough to Accommodate Customers' Expectation of Privacy.**

SBC asserts that CPNI requirements that are more restrictive than Section 222 are no longer appropriate.[9] California takes issue with this viewpoint to the extent that it hampers a state's

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8. See, for example, Re Pacific Bell (1987) 27 CPUC 2d 1 (D.87-12-067) wherein Pacific Bell was penalized for abusive sales marketing practices.

9. CC Docket 96-115, SBC's Opening Comments, pp. 14-15.

ability to strike a balance between its customers' expectation of privacy with competition. We noted in our comments that to achieve this balance, regulators must be aware of customers' expectations about privacy which may vary by community, by the extent to which markets have developed in different communities, and according to the needs of telecommunications carrier for information to promote market development. Comments of the People of the State of California and the Public Utilities Commission of the State of California, Docket 96-115 dated June 10, 1996, p. 5. In order to fashion rules that accommodate these factors, states should have the flexibility to develop rules that comply with the legal requirements of Section 222, while simultaneously incorporating customers' expectations where they reside, and are responsive to competitive market conditions in the state.

In California, customers place a high value on their right to privacy. The state has responded to that expectation by amending the state constitution to make the right to privacy an inalienable right. Cal. Const. art I, §1. The California Legislature has passed various statutes to protect the right to privacy.[10] The CPUC, being bound by the PU Code as well as

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10. For example, Business & Professions Code Section 16606 protects customer lists of answering services as trade secrets and therefore entitled to confidential treatment. And Section 22600 protects the phone numbers of subscribers to facsimile machines. See, "Privacy in Telecommunications - A California Perspective," by Adu and Dumas, Hastings Communications and Entertainment Law Journal, Comm/Ent, vol. 15, no. 2 (Winter 1993).

existing state law in other areas, urges the Commission to adopt rules flexible enough to avoid unnecessary conflict which can only diminish federal/state coordination in achieving the goals of the 1996 Act.

VIII. **Conclusion**

The CPUC continues to agree with the Commission's position that the term "telecommunications services" should be narrowly interpreted to require carriers to obtain customer approval for use of CPNI to market services other than those already provided. California does not support proposed consumer authorization and notification requirements that sacrifice consumer privacy for the sake of placing incumbents in a superior marketing position. We urge the FCC to adopt rules that comply with Section 222 of the 1996 Act, and are flexible enough to accommodate customers' expectations of privacy which may vary by state, region, or community.

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California respectfully submits these reply comments for the consideration of the Commission in the CPNI rulemaking.

Respectfully submitted,

PETER ARTH, JR.
EDWARD W. O'NEILL
MARY MACK ADU

By: Mary Mack Adu
Mary Mack Adu

Attorneys for the People of the
State of California and the
Public Utilities Commission
of the State of California

505 Van Ness Avenue
San Francisco, CA 94102
(415) 703-1952
(415) 703-4432 (FAX)

June 25, 1996

CERTIFICATE OF SERVICE

I, Mary Mack Adu, hereby certify that on this 25th day of June, 1996, a true and correct copy of the forgoing **REPLY COMMENTS OF THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA ON THE NOTICE OF PROPOSED RULEMAKING** was mailed first class, postage prepaid to all known parties of record.

Mary Mack Adu

Mary Mack Adu

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